LING CHICK NGAI

v.

SCOTT & ENGLISH (M) SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[CIVIL APPEAL NO. 12-33-2005-III]
11 JULY 2006

CIVIL PROCEDURE: *Appeal - Fact, findings of - Findings of fact by Sessions Court Judge - Whether SCJ erred - Whether SCJ's judgment based on undisputed evidence - Whether risks in generator passed to appellant - Whether unreasonable to hold respondent responsible for well being of generator - Whether appeal dismissed*

This was an appeal by the appellant (defendant in the court below) against the decision of the Sessions Court Judge (SCJ). The respondent (plaintiff in the court below) had claimed against the defendant for a sum of RM130,000 for the loss of one new Cummins Diesel Generator. After a full trial, the SCJ gave judgment for the plaintiff in the sum of RM129,200 with interest thereon at the rate of 8% per annum from 28 October 2005 until full and final settlement. The background facts were that the appellant had purchased a set of generator model (generator) from the respondent, the sales agent. The generator was tested in the respondent's Kuala Lumpur office in the presence of the appellant's representative and the consultant of the Mulu Park electrification project, Ranhill Bersekutu, prior to the delivery of the same first to Kuching on 30 November 2000 and then to Mulu National Park on 9 January 2001. Subsequently, the generator was moved into a room in the existing generator house and on 23 March 2001, a fire broke out at the generator house burning both the existing and the new generator. As the purchase price had not been paid, the respondent demanded for the full payment of RM130,000 and on 15 January 2002 took out this action to recover the aforesaid sum when the appellant refused to pay the respondent. The issue that arose was whether or not the risks in the generator had passed to the appellant.

A **Held (dismissing the appeal):**

(1) It was clear from the judgment of the SCJ that what she did was to make a finding of fact that the risks in the generator had passed to the appellant based on evidences which were
B clearly undisputed. Further, it was unreasonable and unfair to hold the respondent responsible for the well being of the generator especially when the same had been in the possession of a third party for some three months and at a place where the respondent had no jurisdiction at all.

C **Case(s) referred to:**
APV Hill & Mills Sdn Bhd v. AQ-Pacific Wide Sdn Bhd & Anor [2006] 1 CLJ 370 CA ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Sterns Ltd v. Vickers Ltd [1992] All ER 126 ***(refd)***

D **Legislation referred to:**
Sales of Goods Act 1957, s. 7

For the appellant - M/s Albert Tang (Gordon Tang Chew, Jugah, Wan Ullok & Co)
E *For the respondent - M/s Robert Tang standing in for Chan and Gan*

Reported by Suhainah Wahiduddin

F **JUDGMENT**

David Wong Dak Wah JC:

[1] This is an appeal by the appellant (defendant in the court below) against the decision of the learned Sessions Court Judge
G (SCJ) given on 28 October 2005. The respondent (plaintiff in the court below) had claimed against the defendant for a sum of RM130,000 with interest at the rate of 8% per annum from 28 October 2005, until full and final settlement and costs, for the loss of one (1) new Cummins Diesel Generator set model
H NTA855GC4 with standard accessories (per unit).

[2] After a full trial, the SCJ gave judgment for the plaintiff on 28 October 2005 in the sum of RM129,200 with interest thereon at the rate of 8% per annum from 28 October 2005, until full and
I final settlement and costs to be taxed unless agreed.

[3] The background facts are these. The appellant purchased a set of generator model NTA 855GC4 (generator) together with the standard accessories from the respondent who was the sales agent for Cummins Diesel generator set. The aforesaid purchase is evident in an agreement dated 20 April 2000 entered between the parties. Some of the relevant conditions of the agreement are that the generator is to be delivered to Miri by end of June 2000, payment shall be effected 90 days after the delivery of the generator and the ownership of the generator shall remain with the respondent until the full purchase price is fully paid. The generator was tested in the respondent's Kuala Lumpur office in the presence of the appellant's representative and the consultant for the Mulu Park electrification project, Ranhill Bersekutu prior to the delivery of the same first to Kuching on 30 November 2000 and then to Mulu National Park on 9 January 2001. A few days before 23 March 2001, the generator was moved into a room in the existing generator house. On 23 March 2001, a fire broke out at the generator house burning both the existing and the new generator due to no fault of anybody. As the purchase price had not been paid, the respondent demanded for the full payment of RM130,000 and on 15 January 2002 took out this action to recover the aforesaid sum when the appellant refused to pay the respondent.

[4] The issue below was whether or not the risks in the generator had passed to the appellant?

[5] The SCJ after a full trial found that the risks in the generator had passed to the appellant and entered judgment for the respondent on terms as stated earlier. In doing so she relied on the authority of *Sterns Ltd v. Vickers Ltd* [1992] All ER 126 which held that despite the fact the property in the goods had not passed to the buyer, the risks thereon can in law be passed to the buyer.

[6] The memorandum of appeal contained seven grounds which in my view concern only two complaints, namely the SCJ erred in law in allowing the issue of passing of risks in the generator to be argued when the same was not specially pleaded and also erred in law and fact to conclude that the risks in the generator had passed to the appellant.

[7] I shall deal with the first complaint. It is trite law that unless relevant facts are pleaded, the court will not entertain non pleaded issues. Here Mr. Albert Tang, learned counsel for the appellant submitted that the 'issue of passing of risks' had not been pleaded; hence the SCJ erred in considering it. The SCJ rejected the contention on the ground that the issue of whether or not risks had passed is a question of law and the respondent was only required to plead and adduce the facts. I agree with the view of the SCJ and I do so for the following reasons. Here the respondent is claiming for the purchase price of the generator and in doing so had pleaded that there had been a sale and delivery of the generator to the appellant which is sufficient to ground its cause of action. Implicit in the sale and delivery, the respondent is saying that the risks in the generator had passed to the appellant making it liable for the purchase price. The respondent may have not been correct to say that there was a sale as opposed to an agreement to sell which we have in this case. This does not change the complexion of the case as the issue is still who should bear the risks in the circumstance of this case. Of course the pleadings could have been drafted better but in the whole scheme of things no prejudice had been caused to the appellant. In any event there are enough evidences tendered in court to allow a finding of fact of whether or not risks had passed.

[8] As for the second complaint, it is best that I reproduce the relevant part of the judgment of the SCJ (pp. 56-57 of the record of appeal):

> In answering the question of who bore the risk in this case, I would state firstly, (at the risk of being repetitive), that there was no express agreement who shall bear the risk. Secondly, property in the generator set has been agreed by all concerned to be with the Plaintiff. Thirdly, *Stern*'s case is the authority for saying that risk can be transferred before the property in the goods have passed and that was when delivery has been effected to the buyer. It is only fair for me to highlight here that the decision in *Stern*'s case has raised concern, primarily because it dealt with an undivided part of a bulk of goods. Such concern was voiced by Lord Porter in the House of Lord's case of *Comptoir D'Achat et de Vente du Boerenbond Belge SA v. Luis de Ridder Limitada* [1949] AC 293 when his Lordship said

> It is difficult to see how a parcel is at the buyer's risk when he has neither property nor possession except in such cases as *Inglis v. Stock and Sterns Ltd v. Vickers Ltd* where the purchaser had an interest in an undivided part of a bulk parcel on board a ship, or elsewhere, obtained by attornment of the bailee to him.

However, the observation made by Lord Norman in the same case on the same issue made the position clear when his Lordship said,

> In those cases in which it has been held that the risk without the property has passed to the buyer it has been because the buyer rather than the seller was seen to have an immediate and practical interest in the goods, as for instance when he has an immediate right under the storekeeper's delivery warrant to the delivery of a portion of an undivided bulk in store, or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriate to the several contracts.

In this case before me there was no necessity to do any mental gymnastics because the 'good' was not part of a bulk of goods. It was a straight forward case ie of a buyer accepting delivery of a good he contracted to buy in performance of a contract he had with a third party (ie Mulu National Park). He arranged for the shipment of the generator set to the third party and allowed the third party possession of the generator set.

In the words of Lord Norman which I have emphasized above and would repeat here, the defendant has 'immediate and practical interest' in the generator set such that he even was willing to accept the generator set without the accessories being delivered, something which he could have reasonably used as an excuse for not wanting to accept its delivery. I would thus conclude that the risk in this case has indeed passed to the defendant.

Having so decided, I see no reason to consider the defendant's counsel contention that section 7 of the said Act applies in favour of his client. The said section provides that where there is an agreement to sell specific goods and subsequently the goods without any fault of the seller or buyer perish before the risk passes to the buyer, the agreement is avoided. (pages 56-57 of the RA).

[9] In this complaint, Mr. Albert Tang's submissions are these. Firstly he says that the SCJ wrongly relied on the case of *Sterns Ltd v. Vickers, Ltd* [1922] All ER Rep 126 on the ground that the facts therein were different. With respect, the facts may be

different but the principle of law there is clear and that is risks can be passed even when the property in the goods had not passed. As such the SCJ could not be faulted.

[10] Secondly he contends that the SCJ wrongly interpreted cl. 14 of the General Conditions of Sale. The correct interpretation in counsel's view is that cl. 14 requires the respondent to insure the generator and by implication the risks remain with the respondent. Clause 14 reads as follows:

> Insurance includes cover against the war risk but in the event of war risk insurance being suspended the Sellers reserve the right to cancel this agreement at anytime.

[11] With respect to counsel, I do not agree. At best cl. 14 is a neutral provision in that it places no obligation on anyone to insure the generator. The parties themselves must agree first who should take out insurance on the generator and if there is no agreement, then it just reverts back to the issue who should bear the risks in the circumstance. In any event, I do not think that the matter of insurance was ever contemplated at all by both the appellant and the respondent.

[12] Lastly learned counsel submits that the SCJ was wrong in ignoring s. 7 of the Sales of Goods Act. Again I disagree for the simple reason once she found that risks had passed to the appellant, s. 7 did not assist the appellant in any way.

[13] Coming back to the judgment of the SCJ, it is clear that what she did was to make a finding of fact that the risks in the generator had passed to the appellant based on evidences which were basically undisputed. It is trite law that an appellate court would be slow in interfering with a finding of fact of the trial court unless the decision is so unreasonable that no reasonable tribunal would have come to that conclusion. (see *APV Hill & Mills Sdn. Bhd. v. AQ-Pacific Wide Sdn Bhd & Anor* [2006] 1 CLJ 370) or was plainly wrong (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309). So the question which I need to address is whether or not the SCJ had made such a decision.

[14] Having analyzed thoroughly the evidences adduced in the court below and the judgment of the SCJ, I form the view that I would have arrived at the same decision as she did had I been the presiding judge. The facts which I relied on for my view are as follows:

1. The generator had been inspected in the respondent's Kuala Lumpur office by both the appellant's representative and the consultant of Mulu National Park (Ranhill Bersekutu) prior to delivery;

2. The generator had been in possession of the appellant and the third party for some four months; and

3. The generator had been delivered to a place where the respondent had no control at all. In respect of this factor, I am in agreement with what Bankes LJ said in *Stern*'s case at pp. 127-128:

> With regard to the cases which have been referred to I only desire to say, without deciding the question whether the property passed or not, that it is quite obvious that in this case the goods were in the possession of a third party as against whom, when once the delivery order had been given, it seems to me, the sellers could exercise no control. For the reasons I have given I think that the risk of deterioration rested upon the buyers and they must bear the loss.

[15] The above facts had been alluded to by the SCJ in her deliberations. She was also correct to point out that the appellant could have very well rejected the delivery of the generator as the accessories were not available at that time. Instead they accepted the delivery which shows clearly that the appellant had wanted an "immediate and practical interest". Thus she had in her judgment as required by law sufficiently and judiciously appreciated the evidences before her.

[16] Further I hold the view that the circumstances in this case are such that it would be unreasonable and unfair to hold the respondent responsible for the well being of the generator especially when the same had been in the possession of a third party for some three months and at a place where the respondent had no jurisdiction at all.

[17] For reasons stated above, I dismiss this appeal with costs to be taxed unless agreed to the respondent.